WISCONSIN CIVIL PROCEDURE AND FORECLOSURE

(What Happens in State Court May Not Stay in State Court)

Presented June 14, 2011

Christine Wolk
Law Office of Christine Wolk
128 State Street
Oshkosh, Wisconsin 54901

This is a reminder that a client's state court foreclosure action must be tended carefully to avoid collision with the doctrines of res judicata, claim preclusion and Rooker-Feldman in a Chapter 13.

Litigation is time-consuming – both for the courts and the litigants. But, with the unraveling of the securitizations of thousands of mortgages, the fraud on investors and homeowners, the Lender's bar position that the only defense to foreclosure is the affirmative defense of payment, is unjust. (See *Virkhus v. Virkhus*, 250 Wis. 90, 95, 26 N.W. 2d 156, 159 (1947) (The amount due is not denied unless payment is alleged although the case generally holds that each averment must be answered.)

Bankruptcy debtors counsel previously offered the advice of allowing a default judgment to be entered when faced with a default, because the debtor did owe the mortgage and had not made all the payments. This defense of no defense allowed the state courts to get just a little lazy. The requirement of lender testimony on the authenticity of the note was gradually replaced with hearsay affidavits of Lenders' counsel. The process has morphed into Lender outsourcing of the entire default process to entities, such as LPS, where no participant in the mortgage process is competent to sign an affidavit upon personal knowledge, yet, does so anyway. To paraphrase Pogo, we have seen the enemy and it is of our own creation. We all got lazy.

Unfortunately, while the relatively new disclosure of this new mortgage debt automated collection strategy should cast some doubt on the validity of the information being offered as evidence in the foreclosure, a default judgment is still nearly impossible to undo even when the amount adjudged due most likely includes bogus charges and fees and most certainly involves payment to those who regularly resort to trespass, breaking and entering, and window peeping disguised as a "property inspection" or BPO (broker

price opinion) I still listen agape as the amount due, as presented in the Lender's attorney's affidavit, is summarily accepted because the homeowner "owes the debt". How much? To whom? These are merely annoyances in some state courts. Questions that do not require evidence to answer.

We all know that a foreclosure lawsuit, like any other civil lawsuit, commences, in Wisconsin, with the filing of a summons and complaint. Many homeowners are personally served, but, if not home when the process server arrives, publication is sufficient to obtain jurisdiction (with due diligence – See Wis. Stat. § 801.11(1)(c) and with an authenticated copy of the Summons and Complaint (§ 801.02(3)).

> **(3)** The original summons and complaint shall be filed together. The authenticated copies shall be served together except:
> (a) In actions in which a personal judgment is sought, if the summons is served by publication, only the summons need be published, but a copy of the complaint shall be mailed with a copy of the summons as required by s. 801.11, and;
> (b) In actions in which only an in rem or quasi in rem judgment is sought, the summons may be accompanied by a notice of object of action pursuant to s. 801.12 in lieu of a copy of the complaint and, when the summons is served by publication, only the summons need be published, but a copy of the complaint or notice of object of action shall be mailed with the copy of the summons as required by s. 801.12.

But, see § 801.02(2), for in rem actions:

> **(2)** A civil action in which only an in rem or quasi in rem judgment is sought is commenced as to any defendant when a summons and a complaint are filed with the court, provided service of an authenticated copy of the summons and of either the complaint or a notice of object of action under s. 801.12 is made upon the defendant under this chapter within 90 days after filing.

Does this mean that if the mortgage debt has been discharged in bankruptcy, a homeowner need only be served with the summons and the notice of object of action under § 801.12?

> **801.12 Jurisdiction in rem or quasi in rem, manner of serving summons for; notice of object of action. (1)** A court of this state exercising jurisdiction in rem or quasi in rem pursuant to s. 801.07 may affect the interests of a defendant in such action only if a summons and either a copy of the complaint or a notice of the object of the action under sub. (2) have been served upon the defendant as follows:
> (a) If the defendant is known, defendant may be served in the manner prescribed for service of a summons in s. 801.11, but service in such a case shall not bind the defendant personally to the jurisdiction of the court unless some ground for the exercise of personal jurisdiction exists.
> (b) If the defendant is unknown the summons may be served by publication thereof as a class 3 notice, under ch. 985.
> **(2)** The notice of object of action shall be subscribed by the plaintiff or attorney and shall state the general object of the action, a brief description of all the property affected by it, if it affects specific real or personal property, the fact that no personal claim is made against such defendant, and that a copy of the complaint will be delivered personally or by mail to such defendant upon request made within the time fixed in s. 801.09 (2). If a defendant upon whom such notice is served unreasonably defends the action the defendant shall pay costs to the plaintiff.

I note that §801.12(2) provides that if the defendant "unreasonably" defends, the defendant pays costs to the plaintiff. Of course, in a foreclosure the defendant is already liable for costs under the terms of the mortgage.

Foreclosure actions, though, are also governed by the requirements of Chapters 840-846 of Wis. Stats[1]., see § 840.02:

> **840.02 Chapters applicable.** Except as otherwise provided in chs. 840 to 846, the general rules of practice and procedure in chs. 750 to 758 and 801 to 847 shall apply to actions and proceedings under chs. 840 to 846.

And, contrary to my experience in many of the state courts that prefer to move the process along, § 846.01 provides that the judgment of foreclosure be entered to collect the amount adjudged due. I do have a case, though, still pending, after the court

[1] Ch. 841 governs actions for Declaration of Interests; Ch. 842 governs Partition actions; Ch. 843 governs actions for possession; and Ch. 844 governs actions to abate interference with interest and physical injury to real property.

summarily offered to enter judgment after successful dismissal of a counterclaim. The Lender declined. This was a year ago. The Lender argued unreasonable delay. The court dismissed the TILA counterclaim as being brought to delay the action. No motion for summary judgment has been either entered or even filed.

> **846.01 Foreclosure judgment. (1)** Except as provided in sub. (2), in actions for the foreclosure of mortgages upon real estate, if the plaintiff recover, the court shall render judgment of foreclosure and sale, as provided in this chapter, of the mortgaged premises or so much of the premises as may be sufficient to pay the amount adjudged to be due upon the mortgage and obligation secured by the mortgage, with costs.
> **(2)** A judgment of foreclosure and sale shall not be entered until 20 days after the lis pendens has been filed.

When I ask how a judgment of foreclosure and sale can be entered with the amount due still in dispute, I hear the Lender's argument that the homeowners are just prolonging the action or a look of disdain with the court's agreement.

But, there is still some "wiggle" room. While Wis. Stat. § 846.10(4) states that

> **(4)** The court may order in the judgment of foreclosure that all sums advanced by the plaintiff for insurance, necessary repairs and taxes not included in the judgment may be added to the judgment by order at any time after the entry thereof.

The "standard" FOF, COL and judgment submitted to the court adds that the sums advanced by the plaintiff may be added to the judgment without notice to the homeowner. Where does § 846.10 provide for an ex parte order?

§ 846.13, on the other hand, does define what may be added to the judgment for the purpose of redemption. In pertinent part, § 846.13 provides:

> **846.13 Redemption from and satisfaction of judgment.**
> The mortgagor, the mortgagor's heirs, personal representatives or assigns may redeem the mortgaged premises at any time before the sale by paying to the clerk of the court in which the judgment was rendered, or to the plaintiff, or any assignee thereof, the amount of such judgment, interest thereon and costs, and any costs subsequent to such judgment, and any taxes paid by the plaintiff subsequent to the judgment upon the mortgaged premises, with interest thereon from the date of payment, at the same rate. On payment to such clerk or on filing the receipt of the plain

> tiff or the plaintiff's assigns for such payment in the office of said clerk the clerk shall thereupon discharge such judgment, and a certificate of such discharge, duly recorded in the office of the register of deeds, shall discharge such mortgage of record to the extent of the sum so paid.

I have successfully argued that the amount of judgment cannot be increased by interest and costs incurred prior to the entry of the judgment, but, inadvertently omitted from the judgment calculation.

Also be aware of § 846.12 which provides that interest on the judgment is to accrue at the interest rate in effect just prior to default.

The six areas that command attention in a foreclosure action are:

I. The Answer and Affirmative Defenses,

II. Voluntary Dismissal,

III. Motion for Default Judgment;

IV. Motion for Summary Judgment;

V. Prove the Note - Mitchell Bank v. Schanke; and

VI. Standing

I. ANSWER AND AFFIRMATIVE DEFENSES:

See Wis. Stat. § 806.07 on the reopening of judgments. It is much easier to file an Answer than to reopen a default judgment. There are pro se form Answers that are available and the forms have boxes to check to assert the various defenses. I have had potential clients use a pro se form as a placeholder when the deadline to answer is imminent and I am unable to review the potential clients' paperwork and draft a timely, thoughtful answer.

And, it is important to at least file a Notice of Retainer. The failure to answer or to make an appearance may forfeit the homeowners' rights to receive any notices of further proceedings in the foreclosure, including the Sheriff's Sale and notice of the confirmation hearing. This applies even in those counties whose local rules require notice of motion for default judgment to all homeowners in foreclosure cases. See Wells Fargo Bank NA v. Biba, 2010 WL 3583102 (September 16, 2010) (unpublished).

Wis. Stat. § 802.09(1) allows a party to amend its pleading once as a matter of course at anytime within six months after the filing of the summons and complaint or the deadline set in the scheduling order. Therefore, if a prospective client is able to file a pro se answer sufficient in content to join issue, that answer may be amended and the client's claim preserved.

If issues are tried by either implied or express consent of the parties, the pleadings may be amended to conform to the evidence presented. It is not necessary to amend, but, if a party chooses to amend to conform to the evidence, it may be done upon motion, even after judgment is entered. § 802.09(2).

§ 802.09(3) provides for an amendment for any claim that arose prior to the filing of the summons and complaint and the claim relates back to the date of the filing as to the parties. If the amendment results in a substitution of parties, it must be shown that the new party is not prejudiced.

In a foreclosure case, a lot of interesting things can happen while the case is pending, e.g., the homeowner can be locked out of the home; the lender can lose the proof of insurance provided and force place coverage (eliminating personal property coverage and dramatically increasing the cost of coverage); homeowners are contacted directly, even with court orders forbidding the contact; and, with the modification process, the homeowner may be frustrated with months of futile monthly financial submissions.

In these instances, § 802.09(4) provides that, upon motion and in the discretion of the court, that a "party [may] serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor."

AFFIRMATIVE DEFENSES:

The following affirmative defenses are waived if not raised. § 802.06(8)

(a) A defense of lack of jurisdiction over the person or the property, insufficiency of process, untimeliness or insufficiency of service of process or another action pending between the same parties for the same cause is waived only if any of the following conditions is met:

1. The defense is omitted from a motion in the circumstances described in sub. (7)
2. The defense is neither made by motion under this section nor included in a responsive pleading.

(b) A defense of failure to join a party indispensable under s. 803.03 or of res judicata may be made in any pleading permitted or ordered under s. 802.01 (1) , or by motion before entry of the final pretrial conference order. A defense of statute of limitations, failure to state a claim upon which relief can be granted, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under s. 802.01 (1) , or by a motion for judgment on the pleadings, or otherwise by motion within the time limits established in the scheduling order under s. 802.10 (3) .

(c) If it appears by motion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(d) A defense of lack of capacity may be raised within the time permitted under s. 803.01 .

The following defenses may be presented by motion prior to filing of a responsive pleading. § 802.06(2).

(a) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

1. Lack of capacity to sue or be sued.

2. Lack of jurisdiction over the subject matter.

3. Lack of jurisdiction over the person or property.

4. Insufficiency of summons or process.

5. Untimeliness or insufficiency of service of summons or process.

6. Failure to state a claim upon which relief can be granted.

7. Failure to join a party under s. 803.03 .

8. Res judicata.

9. Statute of limitations.

10. Another action pending between the same parties for the same cause.

II. VOLUNTARY DISMISSALS. § 805.04

(1) By plaintiff; by stipulation. Except as provided in sub. (2m), an action may be dismissed by the plaintiff without order of court by serving and filing a notice of dismissal at any time before service by an adverse party of responsive pleading or motion or by the filing of a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is not on the merits, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim.

(2) By order of court. Except as provided in sub. (1), an action shall not be dismissed at the plaintiff's instance save upon order of court and upon such terms and conditions as the court deems proper. Unless otherwise specified in the order, a dismissal under this subsection is not on the merits.

§ 805.04(1) explains the recent (last few years) filings of multiple dismissals "with leave to reopen". Please note that if a responsive feeling has been filed, the dismissal cannot be accomplished by ex parte motions. Unfortunately, these motions are signed by the court on the day that they are received whether or not notice to the parties is shown.

§ 805.04(1) also provides that if a case is voluntarily dismissed under sub. (1), the dismissal is without prejudice unless filed by a Plaintiff who has previously dismissed an action on the same claim. In that case, the dismissal is on the merits.

Sometimes a case is dismissed after judgment is entered due to reinstatement. Does a foreclosure of the mortgage due to a subsequent default allow the homeowner to raise claims and defenses not raised in the first action? No. See Kowske v. Ameriquest Mortgage Company, 319 Wis. 2d 500, 767 N.W. 409, 2009 WI App 45. The counterclaims are barred by claim preclusion and the common law compulsory counterclaim rule.

III. MOTIONS FOR DEFAULT JUDGMENT.

Wis. Stat. § 840.07 provides that "no default judgment may be granted unless evidence supporting the court's findings and conclusions is in the record".

Notice of the hearing on the motion for default judgment is required by local rule in some counties, such as Winnebago, and, is required when service is by publication. See Wis. Stat. §806.02(4) which requires personal service for entry of a default judgment on a liquidated claim by the Clerk upon affidavit. § 806.02(2) still requires proof of the debt be entered into the record.

The court is not required to enter default judgment based only on the fact of default. " The use of the word "may" in Wis. Stats. § 806.02(1) compels the circuit court to exercise sound discretion before entering a default judgment". Split Rock Hardwoods Inc. v. Lumbers Liquidators, 253 Wis.2d 238, 263 (2002) (Defendant served answer, but, did not file answer with court until 45 days after it was timely served on Plaintiff. Judgment of Circuit Court reversed.) And, when no evidence exists in the record to support the entry of the judgment, it is an abuse of the court's discretion to enter judgment.

While § 840.07 requires that "evidence supporting the court's findings and conclusions is in the record", "this evidence will oftentimes be produced via a formal default judgment hearing, the statute envisions that the evidence can exist without such a hearing". Geneva Nat. Community Ass'n, Inc. v. Friedman, 228 Wis.2d 572, 588 (1999) (Default judgment against condominium association member. Court found sufficient evidence in the record to support judgment.)

Palisades Collection LLC v. Kalal, 324 Wis.2d 180, 781 N.W. 2d 503 (Wis. App. 2010) sets forth the standards for evidentiary affidavits sufficient to support a motion for summary judgment. Palisades dealt with the affidavit of a debt buyer. The Court of Appeals extended this decision to mortgage cases in its unpublished decision: Bank of New York v. Cano, 331 Wis.2d 731, 795 N.W.2d 493 decided January 20, 2011. Bank of New York had supported its summary judgment motion with affidavits that did not meet the Business Record exception to the hearsay rule under § 908.03(6). The Court of Appeals has not yet expanded this standard to default judgments subject to the requirements of § 840.07.

The default judgment, though, is treated as absolute evidence of the debt through the date of its filing, as it applies to standing and the amount of debt in the bankruptcy court. The Rooker-Feldman doctrine prohibits a collateral attack of the judgment in bankruptcy court. See In re Agard, 444 B.R. 231 (Bankr, E.D.N.Y.). Agard also has a very good discussion of the role of MERS in the mortgage securitization process.

IV. SUMMARY JUDGMENT

One of the biggest mistakes that I see with regard to summary judgment motions is the failure to respond. Attorneys who go to the hearing with only the well-pled answer in their arsenal will lose, especially with a judge who believes that the only evidence admissible as a summary judgment response is an affidavit of the homeowner. The Wisconsin Supreme Court has addressed this issue in Tews v. NHI LLC, 333 Wis.2d 389, 793 N.W. 2d 860. The court does recommend, though, that "even though the statute does not always require affidavits to be filed in a proceeding for summary judgment, the best and safest practice is to do so. Attorneys who fail to support or oppose a motion for summary judgment with an affidavit do so at their own peril." In this case, the higher court did review the allegations of the complaint to conclude that a genuine issue of material fact had been pled.

The standard for summary judgment is clearly set forth in § 802.08(2) as follows:

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

The summary judgment motion is the most important in the case, first, obviously, it is a dispositive motion. Second, the presumption that a homeowner is not entitled to a defense must be overcome along with the express state court directive that federal court claims be taken to federal court. As a result, it may be necessary for the homeowner to explain Wisconsin's compulsory common law counterclaim rule (that overrides its statutory permissive counterclaim rule) and the Rooker-Feldman doctrine. I asked one judge why he just ignored my TILA argument, and, he truthfully told me that it was just

too technical. As a result, a claim that was a "per se" violation in the 7th Circuit, was dismissed, gone, and doomed to a similar analysis by the Court of Appeals. Some state court judges believe that federal claims can still be brought in federal court even after judgment has been entered dismissing those claims.

This is not a condemnation of all state court judges. Many review the documents and do their own research to afford the litigants a fair hearing. Most, though, are bogged down in a schedule that is 80% criminal cases, have no law clerks to assist them with briefs and research, and no time to read voluminous briefs and motions.

So, the summary judgment response is a tricky critter. The goal is to establish that there is, indeed, a genuine issue of material fact. The amount due is a factual issue. The goal is to explain the simplest of theories presented with strong legal support. Contract theories work the best, Then, let me know if this works, as I must just lack the simplification gene.

V. PROVE THE NOTE – MITCHELL BANK V. SCHANKE

Mitchell Bank v. Schanke, 268 Wis.2d 571, 676 N.W. 2d 849, 2004 WI 13 is often cited by Lenders' counsel to support the position that a note is unnecessary to complete a foreclosure. The Court of Appeals held (2002 WI App 225, 257 Wis.2d 723, 652 N.W.2d 636) that Mitchell Bank could not enforce its mortgage as it had lost the note. Mitchell Bank appealed and the Supreme Court held, not that the note was unnecessary, but, that the "in a mortgage foreclosure action, the loss of a bill or note alters not the rights of the owner, but merely renders secondary evidence necessary and proper." So, the court looked further and determined that as the mortgage contained a dragnet clause securing antecedent debt, and, as there was antecedent to secure. Mitchell Bank could foreclose to pay the antecedent debt.

The "prove the note" strategy more commonly seen is that of requesting that the original note be produced in court with a "wet" signature. Most of the time, even when the note attached to the complaint has no endorsements and is verified as a true and correct copy of the original, an endorsed note shows up in court. Now, the note should be sequentially endorsed according to the terms of any pooling and servicing agreement,

but, the endorsements are not dated and the appearance of an endorsement usually satisfies the court.

V. STANDING.

The argument that I will mention is standing as it has met with some success. An action must be filed by the real party in interest. In order to have standing to sue, the litigant needs to have a personal stake in the outcome of the litigation and must be directly affected by the issues in controversy. Village of Slinger v. City of Hartford, 2002 WI App 256 Wis. 2d 859, 650 N.W.2d 81. How is that accomplished when the party claiming to be the Plaintiff is not named anywhere on the note or mortgage, the note is not endorsed, and the homeowner has no idea where the Plaintiff ABC Trust fits into the picture? It isn't accomplished and some judges, especially in Milwaukee County, will dismiss a case when the connection is not properly explained.

My purpose in providing this information is to try to inject some information into the already overwhelmed debtor's counsel to maximize effectiveness in the Chapter 13 and to avoid the dreaded, and may times, fatal, Rooker-Feldman Doctrine. Now that we have bankruptcy mortgage modification mediation available in the Eastern District, it is easier to propose a feasible Chapter 13 plan subject to the mediation process. It will change how practitioners strategize the filing of the Chapter 13 vis-à-vis the foreclosure and give the homeowner a better chance at success.

CHAPTER 840

REAL PROPERTY ACTIONS; GENERAL PROVISIONS

840.01 Definition of interest in real property. As used in chs. 840 to 846:

(1) Except as provided in sub. (2), "interest in real property" includes estates in, powers under ch. 702 over, present and future rights to, title to, and interests in real property, including, without limitation by enumeration, security interests and liens on land, easements, profits, rights of appointees under powers, rights under covenants running with the land, powers of termination and homestead rights. The interest may be an interest that was formerly designated legal or equitable. The interest may be surface, subsurface, suprasurface, riparian or littoral.

(2) "Interest in real property" does not include interests held only as a member of the public nor does it include licenses.

History: 1973 c. 189; Sup. Ct. Order, 67 Wis. 2d 585, 767 (1975), 782; Stats. 1975 s. 840.01; 1983 a. 186; 1999 a. 85.

In an action for unreasonable interference with an easement, it was reasonable for the court to order the defendant landowner to place a fence post at least 2 feet away from a right−of−way as interference to easements can be caused even if objects do not physically touch the right−of−way. Hunter v. McDonald, 78 Wis. 2d 338, 254 N.W.2d 282 (1978).

A municipality's regulatory power to condemn, assess, tax, and zone property within its boundaries is not an "interest in real property" under this section. Village of Hobart v. Oneida Tribe of Indians of Wisconsin, 2007 WI App 180, 303 Wis. 2d 761, 736 N.W.2d 896, 06−2639.

840.02 Chapters applicable. Except as otherwise provided in chs. 840 to 846, the general rules of practice and procedure in chs. 750 to 758 and 801 to 847 shall apply to actions and proceedings under chs. 840 to 846.

History: 1973 c. 189; Sup. Ct. Order, 67 Wis. 2d 585, 767, 782 (1975); Stats. 1975 s. 840.02; 1979 c. 89; 1981 c. 314.

840.03 Real property remedies. (1) Any person having an interest in real property may bring an action relating to that interest, in which the person may demand the following remedies singly, or in any combination, or in combination with other remedies not listed, unless the use of a remedy is denied in a specified situation:

(a) Declaration of interest.

(b) Extinguishment or foreclosure of interest of another.

(c) Partition of interest.

(d) Enforcement of interest.

(e) Judicial rescission of contract.

(f) Specific performance of contract or covenant.

(g) Judicial sale of property and allocation of proceeds.

(h) Restitution.

(i) Judicial conveyance of interest.

(j) Possession.

(k) Immediate physical possession.

(L) Restraint of another's use of, or activities on, or encroachment upon land in which plaintiff has an interest.

(m) Restraint of another's use of, activities on, or disposition of land in which plaintiff has no interest; but the use, activity or disposition affect plaintiff's interest.

(n) Restraint of interference with rights in, on or to land.

(o) Damages.

(2) The indication of the form and kind of judgment in a chapter dealing with a particular remedy shall not limit the availability of any other remedies appropriate to a particular situation.

History: 1973 c. 189; Sup. Ct. Order, 67 Wis. 2d 585, 767 (1975); Stats. 1975 s. 840.03; 1993 a. 486.

840.035 Provisional remedies. Provisional remedies may be granted as appropriate.

History: 1973 c. 189; Sup. Ct. Order, 67 Wis. 2d 585, 767 (1975); Stats. 1975 s. 840.035.

840.04 Possession. No remedy shall be denied on the ground that the plaintiff is not in possession unless a statute specifically requires possession.

History: 1973 c. 189; Sup. Ct. Order, 67 Wis. 2d 585, 767 (1975); Stats. 1975 s. 840.04.

840.05 Joinder. Any action proper under s. 840.03 may be brought in rem or in personam according to appropriate statutes for obtaining jurisdiction. Actions in rem and in personam may be joined.

History: 1973 c. 189; Sup. Ct. Order, 67 Wis. 2d 585, 767, 782 (1975); Stats. 1975 s. 840.05.

840.06 Joinder of additional interest−holders. If the court orders that the owner of an interest is a necessary party to an action, the action may not be dismissed, but the plaintiff shall be given leave to join the missing person as plaintiff or defendant.

History: 1973 c. 189; Sup. Ct. Order, 67 Wis. 2d 585, 767 (1975); Stats. 1975 s. 840.06.

840.07 Default judgments. No default judgment may be granted unless evidence supporting the court's findings and conclusions is in the record.

History: 1973 c. 189; Sup. Ct. Order, 67 Wis. 2d 585, 767 (1975); Stats. 1975 s. 840.07.

This section does not require a hearing to produce the necessary evidence to support the court's findings and conclusions. Geneva National Community Association, Inc. v. Friedman, 228 Wis. 2d 572, 598 N.W.2d 600 (Ct. App. 1999), 98−1010.

840.10 Lis pendens; who may file; effect when void; discharge. (1) (a) In an action where relief is demanded affecting described real property which relief might confirm or change interests in the real property, after the filing of the complaint the plaintiff shall present for filing or recording in the office of the register of deeds of each county where any part thereof is situated, a lis pendens containing the names of the parties, the object of the action and a description of the land in that county affected thereby. In any action if the defendant asks relief on a counterclaim or cross−complaint, which contains a legal description of the real estate and seeks such relief, after the filing of the counterclaim or cross−complaint the defendant shall present for filing or recording a lis pendens. From the time of filing or recording every purchaser or encumbrancer whose conveyance or encumbrance is not recorded or filed shall be deemed a subsequent purchaser or encumbrancer and shall be bound by the proceedings in the action to the same extent and in the same manner as if the purchaser or encumbrancer were a party thereto. In any such action in which a lis pendens has been filed or recorded, if the party who presents for filing or recording the lis pendens fails for one year after the

filing or recording thereof to serve and file proof of service of the summons or the counterclaim or cross−complaint on one or more of the adverse parties, the lis pendens shall be void, and upon motion and proof the court may order it discharged. Judgment shall not be entered in favor of the party required to present for filing or recording a lis pendens until 20 days after the lis pendens has been filed or recorded.

(b) A lis pendens that is prepared by a member of the State Bar of Wisconsin need not be authenticated.

(2) Proceedings for acquiring land by right of eminent domain are actions within the provisions of this section and notice of the pendency thereof may be filed at any time, except as otherwise provided by statute.

(3) The lis pendens may be discharged upon the condition and in the manner provided by s. 811.22 for discharging an attachment or by s. 806.19 (1) (a) for satisfying a judgment. An instrument filed before May 1, 1951, but in accordance with this subsection shall be a discharge of the lis pendens described therein.

(4) This section applies to all courts in this state, including United States district courts.

History: 1973 c. 189; Sup. Ct. Order, 67 Wis. 2d 585, 767, 782 (175); 1975 c. 198; Stats. 1975 s. 840.10; 1993 a. 486; 1997 a. 304; 2001 a. 103.

A motion to review a judgment on the grounds that the plaintiff failed to file an amended lis pendens was properly denied. Particularly as between the parties, failure to file a lis pendens is a minor irregularity. Zapuchlak v. Hucal, 82 Wis. 2d 184, 262 N.W.2d 514 (1978).

A foreign divorce action notice filed with the register of deeds of the county in which one foreign litigant owned property was a valid lis pendens. Belleville State Bank v. Steele, 117 Wis. 2d 563, 345 N.W.2d 405 (1984).

Sections 703.25 (3) and 840.10 (1) permit the filing of a lis pendens in an action for a money judgment against a condominium association as the judgment shall be a lien against each condominium unit although their owners are not defendants in the action. Interlaken Service Corporation v. Interlaken Condominium Association, 222 Wis. 2d 299, 588 N.W.2d 262 (Ct. App. 1998), 97−1107.

This section permits a lis pendens to be recorded in connection with an out−of−state suit seeking title or possession of property in Wisconsin by means of a constructive trust. Ross v. Specialty Risk Consultants, Inc. 2000 WI App 258, 240 Wis. 2d 23, 621 N.W.2d 669, 00−0089.

Even if a statutory lis pendens under this section is dissolved, common law lis pendens applies and a purchaser who is a party to the relevant litigation takes the property subject to the outcome of the litigation, including appeals. Gaugert v. Duve, 2001 WI 83, 244 Wis. 2d 691, 628 N.W.2d 861, 98−3004.

A lis pendens under sub. (1) must be maintained as long as there are pending proceedings in an action, including appellate proceedings. Once all proceedings are concluded, the court may order the lis pendens discharged consistent with sub. (3). Zweber v. Melar Ltd., Inc. 2004 WI App 185, 276 Wis. 2d 156, 687 N.W.2d 818, 04−0538.

This section imposes the requirement of recording a lis pendens on the plaintiff who files a complaint and on a defendant seeking relief on a counterclaim or a cross−complaint. A defendant construction lien claimant is not a plaintiff, and no cross−claim is necessary in order for a defendant construction lien claimant to obtain a determination of the amount due it and an order for sale in a lien foreclosure action. There is no logical rationale for imposing the requirements of sub. (1) (a) on a defendant construction lien claimant because it unnecessarily files a cross−claim seeking relief it is entitled to under ss. 779.09 to 779.11. Carolina Builders Corporation v. Dietzman, 2007 WI App 201, 304 Wis. 2d 773, 739 N.W.2d 53, 06−3180.

840.11 Highways; parks; record of order. (1) Every person who makes an application to any court, county board, common council, or village or town board for laying out, widening, vacating, or extending any street, alley, water channel, park, highway, or other public place shall, at or prior to the time of filing the same with the proper officer, present for recording in the office of the register of deeds of each county in which the affected land is situated a lis pendens, as provided in s. 840.10, containing the person's name and a brief statement of the object thereof and a map and description of the land to be affected thereby.

(2) No final order, judgment or decree or final resolution or order taking or affecting such land, based upon any application therefor, shall be notice to any subsequent purchaser or encumbrancer unless a certified copy thereof, containing a legal description, as defined in s. 706.01 (7r), of the land affected thereby, and accompanied with a map showing the location thereof, is recorded in the office of the register of deeds of the county in which the land is situated.

History: 1973 c. 189; Sup. Ct. Order, 67 Wis. 2d 585, 767 (1975); Stats. 1975 s. 840.11; 1993 a. 486; 2009 a. 348.

The application of this section is not limited to municipalities. Rock Lake Estates Unit Owners Association, Inc. v. Town of Lake Mills, 195 Wis. 2d 348, 536 N.W.2d 415 (Ct. App. 1995), 94−2488.

840.12 Survey may be ordered. In all actions relating to real property the court may by order give any party thereto leave to make any survey of any premises affected by such action, or of any boundary line of such premises, or between the lands of any of the parties and the lands of other persons, when satisfied that such survey is necessary or expedient to enable either party to prepare that party's pleadings in the action. The order for such survey shall specify the premises or boundary lines to be surveyed, and a copy thereof shall be served upon the owner or occupant before any entry is made to make such survey. After such service the party obtaining such order may, with the necessary surveyors and assistants, enter the premises specified in such order at any reasonable time and make such survey without being liable to any action therefor except for injury or damages unnecessarily caused thereby.

History: 1973 c. 189; Sup. Ct. Order, 67 Wis. 2d 585, 767 (1975); Stats. 1975 s. 840.12; 1993 a. 486.

840.16 Land sold, where; limitation on sheriff; effect of deed. (1) Real property adjudged to be sold must be sold in the county where the premises or some part thereof are situated, by the sheriff of that county.

(2) The sheriff shall not purchase at such sale, or be interested directly or indirectly in any purchase; all sales made contrary to this prohibition are void.

(3) A deed executed by the sheriff upon such sale shall be effectual to pass the title, rights and interest of the parties in the premises adjudged to be sold and of all purchasers or encumbrancers thereof whose conveyance or encumbrance is made, executed, recorded, perfected or obtained subsequent to the filing of the notice of the pendency of the action in which such real property is adjudged to be sold, unless the judgment otherwise directs.

History: 1973 c. 189; Sup. Ct. Order, 67 Wis. 2d 585, 767 (1975); Stats. 1975 s. 840.16.

840.17 Judicial sale; report if sheriff incapacitated. If the sheriff who made a sale of land dies, departs from the state or becomes otherwise incapacitated to report or to execute the deed, such report may be made by the undersheriff, a deputy sheriff, or by any party to the action, by affidavit; and such deed may be executed by the clerk on ex parte order of the court.

History: 1973 c. 189; Sup. Ct. Order, 67 Wis. 2d 585, 767 (1975); Stats. 1975 s. 840.17.

840.18 Deeds by sheriffs' successors. In all cases where any sale has been made or is hereafter made by any sheriff under or in pursuance of any order, judgment or decree of any court and the sheriff did not, or does not, before the expiration of the sheriff's term of office, execute a deed to carry the sale into effect, the deed may be executed by the successor of the sheriff in office at the time of the application for the deed, and any deed so executed by any successor of the sheriff making the sale while in office shall have the same effect as though it had been executed by the sheriff making the sale.

History: 1973 c. 189; Sup. Ct. Order, 67 Wis. 2d 585, 767 (1975); Stats. 1975 s. 840.18; 1993 a. 486.

Couple threatens to take Bank of America's furniture for Court Costs:

By Tamara Lush, AP
June 6, 2011

ST. PETERSBURG, Fla. - Months after Bank of America wrongly foreclosed on a house Warren and Maureen Nyerges had already paid for, they were still fighting to get reimbursed for the court battle.

So on Friday, their attorney showed up at a branch office in Naples with a moving truck and sheriff's deputies who had a judge's permission to seize the furniture if necessary. An hour later, the bank had written a check for $5,772.88.

"The branch manager was visibly shaken," attorney Todd Allen said Monday, recalling the visit to the bank last week. "At that point I was willing to take the desk and the chair he was sitting in."

After the moving company and sheriff's deputies get their share, the Nyerges should receive the rest of the money this week, ending a bizarre saga that started when they paid Bank of America $165,000 cash for a 2,700-square-foot foreclosed home in Naples in 2009.

About four months later, a process server knocked on their door and handed Warren Nyerges a notice of foreclosure.

"This is a big mistake," he recalled saying. "You must have the wrong house. We bought a foreclosure and don't have a mortgage."

That started 18 months of frustrating phone calls, paperwork and court hearings. Whenever Nyerges called the bank, representatives told him to "come up to date" with his payments. When he called 25 different law firms, no attorney would take the case. When he went to court, the lawyers for the bank filed incorrect motions and were woefully unprepared for the hearings.

"It was mind boggling," said Nyerges, a 46-year-old retired police officer. "To try to unscrew the screw up, it's not as easy as it sounds."

Eventually the Nyerges found Allen. They fought the foreclosure and won, proving that they owned the home outright.

During his research, Nyerges heard that his name got transposed from purchase agreements onto the prior foreclosure.

"I don't know if that is a fact, because no one really had the facts," he said.

In September 2010, a Collier county judge ordered Bank of America to pay the couple's $2,534 attorney fees. But by last week, the bank hadn't paid up, so Allen got a judge's permission to seize assets.

In an email to the Associated Press on Monday, Bank of America spokeswoman Jumana Bauwens apologized to the couple about the "delay in receiving the funds."

"The original request went to an outside attorney who is no longer in business," she wrote.

The law office of David J. Stern, which handled the Nyerges' case for Bank of America, told judges across Florida in March that it will end its involvement in 100,000 foreclosure cases.

The Florida attorney general's economic crimes division is investigating three law firms, including Stern's, over allegations that they created fraudulent legal documents, gouged homeowners with inflated fees, steered business to companies they owned and filed foreclosures without proving the bank actually had legal interest in the loans.

According to employee testimony filed with Florida authorities, Stern's employees churned out bogus mortgage assignments, faked signatures, falsified notarizations and foreclosed on people without verifying their identities, the amounts they owed or who owned their loans.

The attorney general is also looking at whether Stern paid kickbacks to big banks.

This isn't the first time that Bank of America has tried to foreclose on a property that was owned by a person without a mortgage. In 2009, a Fort Lauderdale man named Jason Grodensky bought a home in cash from Bank of America in a short sale. But in court, the foreclosure case continued and a judge ordered the property to be sold. Bank of America acknowledged the error and rescinded the foreclosure.

Allen sees the Nyerges case as symbolic of the foreclosure crisis. Courts are backlogged, and banks and their attorneys aren't scrutinizing foreclosure paperwork.

And Nyerges said he's still upset with Bank of America.

"They couldn't even spell our name right in the apology," he said.